NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** Date: August 28, 2008 Time: 2:00 p.m. Hon. Louisa S. Porter

TABLE OF CONTENTS

PAGE(S)

I INTRODUCTION 1

II LIVING ESSENTIALS JUSTIFIES NEITHER DISCOVERY NOR DELAY 1

The Timetable. 1

What Living Essentials Knew and When. 2

Hansen's Injunction Motion. 2

Living Essentials' Michigan Case. 3

III LIVING ESSENTIALS STILL DOES NOT SAY WHAT DISCOVERY IT SEEKS OR WHY 4

Living Essentials' Discovery Claims. 4

Living Essentials' Fails to Justify *Any* Discovery Now. 5

The Danger of By-Passing Rule 26. 5

IV DISCOVERY WILL YIELD NOTHING FOR THIS INJUNCTION MOTION 6

Literal Falsity and the Legal Presumptions that Follow. 6

Living Essentials' Key Admissions and Literal Falsity. 7

The Depositions of Rodney Sacks and Thomas Davis, Ph.D. Are Unnecessary. 8

Rodney Sacks. 8

Dr. Davis. 8

V HANSEN DID NOT DELAY THIS ACTION 9

VI CONCLUSION 10

Table of Authorities

Page(s)

CASES

American Medical Corp v. Axiom Worldwide Inc., 522 F.3d 1211 (11th Cir. 2008) 7

Castrol, Inc. v. Quaker State Corp., 977 F.2d 57 (2d Cir. 1990) 6

Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312 (2nd Cir. 1982) 8

eBay v. MercExchange LLC, 547 U.S. 388 (2006) 7

Living Essentials v. N2G Distributing , Inc.. 2008 U.S. Dist. LEXIS 30047 (E.D. Mich. April 14, 2008) 3

McNeil-PPC, Inc. v. Pfizer Inc., 351 F.Supp.2d 226 (S.D.N.Y. 2005) 7, 8

Tillery v. Leonard & Sciolla, LLP, 437 F.Supp.2d 312 (E.D. Pa. 2006) 7

Time Warner Cable, Inc. v. Directv, Inc., 497 F.3d 144 (2d Cir. 2007) 6, 7, 8

STATUTES

The Civil Justice Reform Act of 1990 5

RULES

Local Rule 16.1 5

OTHER AUTHORITIES

Federal Rule of Civil Procedure 26 ..... 4, 5

Federal Rule of Civil Procedure 34 ..... 5, 6

I
INTRODUCTION

Living Essentials' discovery motion is just another attempt to buy time. Judge Gonzalez, on almost identical papers, has denied Living Essentials' *ex parte* application for a two or three month delay. Here, Living Essentials cannot justify **any** need for expedited discovery—except as yet another excuse to put off Hansen's motion.

Hansen's injunction papers make clear that this is a "literally false" case.[1] That motion, by specific design, focuses primarily on Living Essentials' **own admissions** on its website.[2] Those admissions establish irreparable harm and Hansen's right to injunctive relief as a matter of law. Nothing more is required.

II
LIVING ESSENTIALS JUSTIFIES NEITHER DISCOVERY NOR DELAY

The Timetable.

Eight weeks ago, on July 1, Hansen served its complaint. Thirty-seven paragraphs of material facts[3] state in precise detail Living Essentials' false advertising and trade libel. Hansen quoted *verbatim* the texts of commercials that support its claim. The complaint made clear that Hansen sought injunctive relief.

Living Essentials waited more than two weeks, until July 16, to ask for three more weeks—until August 11—to respond to that complaint. Hansen agreed. On August 11, the day Living Essentials' response was due, it requested, and again Hansen granted, even more time—to August 18.[4]

Meanwhile, on August 8, Hansen served its preliminary injunction papers. They reiterate the facts detailed in Hansen's complaint, included Living Essentials' website admissions, and

---

1 Those papers are Docket No. 7.

2 Within 24 hours of Judge Gonzalez' order, Living Essentials' website shut down. Kammer declaration, ¶ 20. Hansen assumes that Living Essentials has preserved **all** versions of that website with a litigation hold.

3 For the Court's convenience, Hansen includes a copy of its complaint as Exhibit 1 to the Request for Judicial Notice; ¶¶ 9 though 46 state detailed facts about Living Essentials' false advertising and trade libel.

4 Living Essentials' August 18th response was unremarkable; it answered with the expected denials and 8 affirmative defenses. Docket No. 9.

briefed the law that, because of Living Essentials' literally false advertising, irreparable injury is presumed and injunctive relief appropriate.

Living Essentials waited until August 14—six weeks with the complaint in hand and more than a week after receiving Hansen's motion—to claim it needed discovery. It waited yet another week to file this motion. Now Living Essentials demands that everything stop.

What Living Essentials Knew and When.

Hansen's July 1 complaint did not merely state bare-bones allegations. Rather, paragraphs 9 through 7 spell out Living Essentials' competition with Hansen in the energy drink market. Then, paragraph 18 gets to the heart of it: " …**the name, "5-HOUR ENERGY®," is, in and of itself, false and misleading …"** Paragraphs 19 through 23 quote the first Living Essentials' commercial and specify precisely what is untrue. Paragraphs 24 though 26 quote another commercial and 26 detail its false statements. Paragraphs 27 through 30 quote yet a third and do the same.

Paragraphs 31 through 37 quote the claims on Living Essentials' labels and specify what is false. Finally, paragraphs 38 through 44 state in detail how Living Essentials targets Hansen—an element that establishes Hansen's right to injunctive relief without showing consumer confusion.

Hansen's Injunction Motion.

Hansen's motion raised nothing new—certainly not to Living Essentials. Hansen quotes the same advertising and details the same false claims.[5] It attacks the "no crash" and "five hours" claims on Living Essentials' labels[6] and the *5-hour ENERGY®* name;[7] it identifies Living Essentials' direct attack on Hansen's energy drink products.[8]

What is "new" in Hansen's injunction papers are Living Essentials' own website's admissions—hardly "new" to Living Essentials.[9] As that website concedes, Living Essentials' *5-*

---

5 Hansen's preliminary injunction memorandum, pp. 7-9. Docket No. 7.1.
6 *Id.* at 3.
7 *Id.* at 6-7.
8 *Id.* at 2, 9-10.
9 *Id.* at 3-6.

hour ENERGY® "energy drink" provides **no physical energy**.[10] Its own graphic, reflecting its "clinical trial", belies its "no crash later" and five hours of energy claims.[11]

In these circumstances, Living Essentials cannot now demand sweeping expedited discovery and try to postpone the injunction hearing for months.

Living Essentials' Michigan Case.

In its recent Lanham Act suit against a competitor in Michigan,[12] Living Essentials went, with lightning speed, from complaint on March 7, to injunction motion on March 13, to hearing and decision three weeks later on April 7—all without discovery on the merits.[13] It forced that competitor, "6 Hour Energy Shot," to pull its product off the shelves and out of distribution channels, and to redesign its packaging because "6 Hour Energy Shot" had infringed Living Essentials' trade dress.[14]

In Michigan, Living Essentials argued that the court could decide the trade dress issue on the exemplars in its papers—no need for discovery there—and irreparable injury as a matter of law.[15] That is precisely the case here. Hansen put the *verbatim* texts of Living Essentials' ads and labels before the Court; it quoted Living Essentials' own website's admissions; it argues that irreparable harm is presumed as a matter of law. In these circumstances, Living Essentials is not entitled to expedited discovery, especially when it does not—cannot—say what discovery it needs or why.

/ / /

/ / /

---

[10] *Id.* at 4-6.

[11] *Id.* at 3-4. By citing that "clinical trial," Hansen does not agree that its methodology or results are valid.

[12] *Innovation Ventures, LLC d/b/a/ Living Essentials v. N2G Distributing , Inc.*. 2008 U.S. Dist. LEXIS 30047 (E. D. Mich. April 14, 2008). Living Essentials' complaint gave N2G even less detail than Hansen's complaint in this case.

[13] Living Essentials played rough. Its counsel sent threatening letters to distributors, wholesalers and retailers with a copy of the complaint; cancelled orders resulted. N2G wanted the list; Living Essentials refused. So N2G sought emergency discovery on this collateral issue. McIntyre declaration, ¶¶ 2-3.

[14] *Innovation Ventures*, *supra* at * 12-21. The USPTO rejected Living Essentials' trademark application for "5-Hour Energy" as merely descriptive of the product. *Id.* at *3. The USPTO apparently took the claim inherent in the "5-Hour Energy" name at face value: "merely describes a product that provides **energy to the user for up to 5 hours** …" *Id.* [emphasis added]. We know from Living Essentials' website that this is not the case.

[15] McIntyre declaration, ¶ 4.

III
LIVING ESSENTIALS STILL DOES NOT SAY WHAT DISCOVERY IT SEEKS OR WHY

Living Essentials ignores the proscription that discovery not take place until counsel have engaged in Rule 26's process and prepared a discovery plan for the Court. Hence, Living Essentials' excuse for jumping ahead must be some genuine emergency. What that emergency is, however, Living Essentials fails to say. The shamelessly generality of its discovery requests only underscores either that Living Essentials does not need this discovery now—but wants to stall for time—or has no idea what it needs. Neither is an excuse to put the injunction hearing on hold for another two or three months.

Living Essentials' Discovery Claims.

It claims it needs 15 document requests—but does not say **what** documents or even **what categories** of documents; it fails to say **why** it needs them now or **how** any of those unspecified documents have anything to do with Hansen's motion.

It claims it needs 5 interrogatories—but does not say **what** it would ask, **why** it needs the information or **how** any such questions might bear on any injunction issue.

It claims it wants a 30(b)(6) deposition but does not even say **what** categories of information it seeks or **why** it needs any of it.

It claims it needs two half-day depositions of **unnamed** persons who are "other witnesses discovered with information directed to the **issues raised** in the Hansen preliminary injunction motion or Living Essentials **defenses**." What **issues**? Living Essentials will not say. The Court should presume, however, that by now Living Essentials knows if it has **any defenses** and has lined up witnesses whose declarations it can file.

It claims it needs "discovery from **any third parties** with information **relevant** to the Hansen preliminary injunction motion or any Living Essentials defenses." The breadth of that demand hardly passes muster under "ordinary" discovery standards; it does not justify extraordinary, expedited discovery.

Finally, it claims it needs to depose Rodney Sacks and Thomas Davis, Ph.D.[16]

Living Essentials' Fails to Justify *Any* Discovery Now.

Living Essentials' gives no reason for expedited **discovery**. It argues that an injunction will cause it harm; that is an argument against the motion, but it does not justify discovery. It argues that Hansen relies on "old" law; again, an argument against the motion, not for discovery. It identifies Dr. Davis' declaration and says that it may submit its **own** expert's declaration. Either it has an expert who can counter Dr. Davis or it does not—no reason for expedited discovery.

Living Essentials cites a legion of cases that this Court has authority to allow expedited discovery. That misses the point. The **only** issue is whether it has "good cause" **in this case** for expedited discovery. It offers none.

The Danger of By-Passing Rule 26.

This Court is well aware of the major changes in discovery practice after the December 2006 Federal Rules amendments. This Court also has considerable experience with its ENE procedures that originated with the passage of the Biden Bill, the Civil Justice Reform Act of 1990. The Local Rules impose a discovery stay until **after** the ENE.[17] Living Essentials wants to bypass all that—with significant unintended, or perhaps intended, consequences.

Living Essentials' unarticulated requests necessarily implicate ESI because of the addition of "electronically stored information" to Rule 34. The problem, however, with ESI production in modern America is that some 90% of documents are produced electronically and an estimated 80% are **never** printed. They reside only in the various memory media of the personal computers and servers or in off-line storage media. As the Court is also aware, in most companies the great majority of that ESI is in the form of e-mail and attachments.[18]

Thus the 2006 Amendments impose an early obligation to discuss the breadth, form, and ramifications of ESI discovery, since most "documents" fall into that category. Judges and commentators press parties to work together to devise a search methodology that will "harvest"

---

16 See discussion at pp. 8-9, below.
17 CivLR 16.1.
18 Kammer declaration, ¶ 4.

relevant and responsive ESI; most attorneys try to do so to minimize the expense of retrieving, harvesting, reviewing, and producing ESI.[19]

Because most corporate clients' ESI is email, the challenges of appropriate ESI production are further compounded. E-mail software has mediocre search functions. Microsoft's Outlook® searches, for example, are generally limited to a single word or exact phrase. The challenge is finding all responsive documents without harvesting a vast number that deal with irrelevant matters yet contain the name of a product, process, party, or witness. Hence, many companies must use third-party software that allows logical or Boolean search phrases to harvest truly relevant materials from the mass of stored data.[20]

Living Essentials' unarticulated requests offer **no** method to arrive at logical search phrases that would produce responsive and discoverable ESI, even if there were a compelling need for expedited production. In addition, although these parties are direct competitors, Living Essentials does not even hint at the need for a protective order—frequently a time-consuming negotiation.

Hansen's ESI resides on the individual computers of its employees and executives or on computer servers. Thus, any search involves the stored ESI of each employee and on each server. Absent a negotiated joint agreement to define and utilize search phrases, there is no reasonable way to conduct an intelligent and economical search of Hansen's ESI.[21]

IV
DISCOVERY WILL YIELD NOTHING FOR THIS INJUNCTION MOTION

Literal Falsity and the Legal Presumptions that Follow.

When a Lanham Act plaintiff demonstrates literal falsity, the courts presume irreparable harm.[22] That is Hansen's case. As a consequence, Living Essentials does not need discovery to find out whether Hansen has been irreparably harmed.

Apparently recognizing this legal fact, Living Essentials claims that "Hansen is applying

---

[19] Kammer ¶¶ 5-6.
[20] *Id.* at ¶ 8.
[21] *Id.* at ¶ 10.
[22] *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1990); *Time Warner Cable, Inc. v. Directv, Inc.*, 497 F.3d 144, 162 (2d Cir. 2007).

old law"[23] and cites to "**newer**" law—*eBay v. MercExchange LLC* [24] and *American Medical Corp v. Axiom Worldwide Inc.*[25] Neither changes the landscape.

In *eBay*, the Supreme Court held that the traditional test—showing irreparable harm—was necessary to obtain permanent injunctive relief. *eBay* is inapposite, however, because it was specifically limited to disputes arising under the **Patent Act**.

American Medical, a Lanham Act literal falsity case, held that falsity is sufficient to sustain a finding of irreparable injury when the false statement is made in comparative advertising between plaintiff's and defendant's products.[26] This is not "new law." Hansen's moving papers address this very issue: "[i]rreparable harm is presumed where the advertisements at issue are literally false and draw a direct comparison to the plaintiff."[27]

Here, Living Essentials' advertisements compare itself to Hansen's Monster Energy® drinks. Thus, even applying *American Medical*, Hansen remains entitled to a preliminary injunction. [28] More importantly, Living Essentials ignores those cases that hold irreparable harm is presumed in literally false advertising cases even **without** direct comparison.[29]

Living Essentials' Key Admissions and Literal Falsity.

Living Essentials features a chart on its website that ironically puts the lie both to its "no crash" claim and its "five hours of energy" assertion.[30]

Living Essentials claims that with *5-hour ENERGY*® there is "**No crash** later." Yet, as its own graphic demonstrates, almost a quarter of the participants in its "clinical trial" experienced that "crash." **Zero crash** does not mean **almost 25%** experience a "crash."

The graphic further demonstrates that barely half (only57.7%) of "clinical trial" participants claimed they experienced "**5 hours** of energy"—whatever "energy" means in this

---

23 Living Essentials' memorandum, p. 7, fn. 2.
24 *eBay v. MercExchange LLC,* 547 U.S. 388 (2006).
25 *American Medical Corp v. Axiom Worldwide Inc.*, 522 F.3d 1211 (11th Cir. 2008).
26 The *American Medical* plaintiff failed to demonstrate the comparative advertising component. *Id.* at 1227.
27 Hansen injunction memorandum, 21: 20-21.
28 Living Essentials also cites to *Tillery v. Leonard & Sciolla, LLP*, 437 F.Supp.2d 312, 329 (E.D. Pa. 2006) but that case does not deal with literally false claims and is, therefore, inapposite.
29 *Time Warner Cable, supra*; *McNeil-PPC, Inc. v. Pfizer Inc*., 351 F.Supp.2d 226 (S.D.N.Y. 2005).
30 Hansen injunction memorandum, p. 7.

Living Essentials' context.[31] It is axiomatic that "**five hours** of energy" does not mean "**only 57%** enjoy **five hours**." Do 25% of them "crash"?

For Living Essentials, it only gets worse. It admits that *5-hour ENERGY®* does **not** provide **any physical energy**. Its website has a "FAQ's" link with nineteen questions and answers. The tenth question and answer admit:

> If 5-Hour Energy contains **zero** net carbohydrates, from where does it derive its **energy**?
>
> 5-Hour energy works to provide mental alertness, focus and improved mood rather than physical energy..."[32] [Emphasis added.]

Living Essentials has engaged in both comparative and non-comparative advertisements. Because its advertisements are literally false, the law **presumes** irreparable harm. "Because it is virtually impossible to prove that so much of one's sales [was] lost or that one's goodwill [was] damaged as a direct result of a competitor's advertisement, the plaintiff need not point to an actual loss or diversion of sales… ."[33]

The Depositions of Rodney Sacks and Thomas Davis, Ph.D. Are Unnecessary.

No deposition of Rodney Sacks or Dr. Davis can disprove literal falsity.

Rodney Sacks.

Living Essentials appears to ignore that this is a "literally false" case; hence, Hansen does not need to prove irreparable harm. Hansen, at least at this stage, has either carried its "irreparable injury" burden as a matter of law or it has not. As a consequence, however, Rodney Sacks' deposition is unnecessary to oppose Hansen's motion.

Dr. Davis.

Similarly, because the website admits that the "**5 hours** of energy," and without a "**crash**," claims are literally false, Dr. Davis' deposition is unnecessary.

Living Essentials argues that Hansen's motion "addresses complex scientific issues," such that Dr. Davis must be deposed "to test [his] conclusions." Nothing Dr. Davis could say, however, will overcome Living Essentials' own admissions about *5-hour Energy*®. Nothing he could say will change the **facts** that *5-hour Energy*® admittedly does not provide five hours of **physical** energy or that *5-hour Energy*® could cause a "crash." Living Essentials has already "tested" Dr. Davis' conclusions with its own "clinical trial"—it **supports** Dr. Davis' conclusions.

---

[31] We will see on Living Essentials' website that it is not **physical** energy.
[32] Hansen injunction memorandum, 5:2-9.
[33] *Time Warner Cable, supra* at 161, citing to *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312 (2nd Cir. 1982). *See* also *McNeil-PPC, Inc.* at 250.

V
HANSEN DID NOT DELAY THIS ACTION

Living Essentials, claiming that *5-hour Energy*® has been around for four years,[34] argues that Hansen should have sued it sooner, based on the August 7, 2008 transcript of an "earnings call" between Hansen CEO Rodney Sacks and financial analysts. Rodney Sacks is quoted as saying that Hansen had "wanted [the "energy shot" market] to mature" before it could justify introducing its own brand into that market. This "delay" argument fails.

First, even if the transcript were admissible,[35] Living Essentials' assumption that, because Hansen wanted the market for energy drinks in smaller containers to mature, it knew about *5-hour Energy*® is baseless.[36] **Second**, Living Essentials' further assumption that, even if Hansen knew about *5-hour Energy*® , it also knew that the advertising claims were untrue is also false.[37] **Finally,** Living Essentials' own website does it in. It only posted its damning "no physical energy" segment **after** February 2008[38] and its "clinical trial" results in December 2007.[39] If Hansen had known that Living Essentials' advertisements were false, it would have sued sooner.[40]

The facts are that, in March 2008 Hansen was forced to bring a lawsuit against another energy drink manufacturer, N2G, for trademark infringement. Until then, Hansen had paid almost no attention to the manufacturers of energy drinks sold in smaller containers and was unaware of

---

34 In its trademark applications, however, Living Essentials certified to the USPTO that it first used "5 Hour Energy" in commerce only in June 2005. Request for Judicial Notice, Exhibit 3.

35 See Hansen's separate evidence objections.

36 Sacks declaration, ¶¶ 5, 6 and 7.

37 *Id.*

38 Kammer declaration, ¶ 19.

39 Kammer declaration, ¶ 17.

40 Sacks declaration ¶ 6.

their advertising.[41]

About a month before filing this action, Hansen first learned of the disparaging statements Living Essentials' commercials made about Hansen's Monster Energy® products.[42] Hansen started to focus intense scrutiny on *5-hour Energy*® and reviewed the *5-hour Energy*® website. Hansen discovered that *5-hour ENERGY*® admitted that it did not actually provide five hours of energy and that, in spite of the label's "no crash" claim, the company's own "clinical trial" proved that the product actually caused a significant percentage of its users to "crash".[43] Hansen investigated and filed this lawsuit on July 1.

As this timeline shows, Living Essentials' "delay" claim is another red herring.

VI
CONCLUSION

Living Essentials cannot justify expedited discovery; it should not be allowed to delay the injunction hearing Judge Gonzalez has scheduled.

DATED: August 27, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: */s/ Edward J. McIntyre*
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

[41] *Id.* at ¶¶ 4-5.
[42] *Id.* ¶¶ 5-6.
[43] *Id.* ¶ 6.

CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** to be served in the following manner:

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Daniel T. Pascucci, Esq. (SBN 166780) Nathan R. Hamler, Esq. (SBN 227765) Mintz Levin Cohn Ferris Glovsky and Popeo PC 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130 Telephone: (858) 314-1510 Facsimile: (858) 314-1501 dpascucci@mintz.com nhamler@mintz.com Attorneys for Innovation Ventures LLC dba Living Essentials	

Manual Notice List

The following is the list of attorneys who are not on the list to receive e–mail notices for this case (who therefore require manual noticing). I served the following by email and Federal Express

Mark B. Mizrahi, Esq. (SBN 179384) Belasco Jacobs & Townsley, LLP 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

CASE NO. 08-CV-1166 IEG (POR)

DECLARATION OF RODNEY SACKS IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY

Date: August 28, 2008
Time: 2:00 p.m.

Hon. Louisa S. Porter

Rodney Sacks declares:

1. I am the Chairman of the Board and Chief Executive Officer of Hansen Beverage Company ("Hansen"). The facts in this declaration are based on my own personal knowledge.

2. Since 1992, Hansen has developed, marketed, sold, and distributed a variety of product lines in the specialty or "alternative" beverage category—including non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas, including its line of the popular Monster Energy® drinks.

3. Monster Energy® drinks are sold or are about to be sold in a variety of container sizes including 3, 8, 15, 16, 16.9, 23.5, 24 and 32 ounce containers.

4. In or about March 2008, Hansen became aware that N2G Distributing Inc. and Alpha Performance Labs were infringing Hansen's trademarks and instituted proceedings against them. N2G Distributing Inc. and Alpha Performance Labs are manufacturers of "energy" drinks sold in smaller containers that compete with Hansen's Monster Energy® drinks.

5. There are hundreds of manufacturers of energy drinks. Although Hansen monitors the activities of its larger competitors that produce energy drinks, except as described in the preceding paragraph, it did not, previously pay attention to the manufacturers of energy drinks sold in smaller containers, as the sales of those products appeared limited and Hansen was then not aware of their advertising activities. However, when it came to Hansen's attention that its competitors producing and marketing "energy drinks" in smaller containers had begun aggressively advertising and marketing their products, Hansen focused more attention on the activities of those competitors.

6. Approximately a month prior to Hansen filing its complaint in these proceedings, Hansen became aware of the extensive advertising and other promotional and marketing activities of Living Essentials. It was then that Hansen first began to learn of the disparaging publications Living Essentials' commercials made about Hansen's Monster Energy® products. Hansen then began to investigate *5-hour Energy,®* its advertising and

marketing activities, and the claims it made. Hansen reviewed the *5-hour Energy*® website and discovered that *5-hour Energy*® admitted, *inter alia*, that it did not always or uniformly provide five hours of energy and that, in spite of the product's label's claim of "no crash," the company's own "clinical trial" proved the product actually caused a significant percentage of its users to "crash." Hansen also investigated the full extent the false claims that were being made by *5-hour Energy's*.® After concluding its investigation, Hansen filed this lawsuit. Had Hansen known earlier about *5-hour Energy's*® false claims, advertising claims and disparaging publications about Hansen's Monster Energy® drinks, I would have authorized this lawsuit then, just as soon as I was practicably able to do so.

7. As Living Essentials points out, in an August 8, 2008 Earnings Call I discussed the fact that Hansen had been observing maturation of the market for "energy" drinks sold in smaller containers to evaluate the viability and desirability of Monster Energy® being sold in smaller containers. However, attributing anything more to that statement—as Living Essentials does—to suggest that Hansen knew about the false statements of *5-hour Energy*® takes my statement completely out of context and is incorrect.

I declare under penalty of perjury under the laws of the United States of America that the facts in this declaration are true and correct, and that I executed this declaration on August 27, 2008.

RODNEY SACKS

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF RODNEY SACKS IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** to be served in the following manner:

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Daniel T. Pascucci, Esq. (SBN 166780) Nathan R. Hamler, Esq. (SBN 227765) Mintz Levin Cohn Ferris Glovsky and Popeo PC 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130 Telephone: (858) 314-1510 Facsimile: (858) 314-1501 dpascucci@mintz.com nhamler@mintz.com Attorneys for Innovation Ventures LLC dba Living Essentials	

Manual Notice List

The following is the list of attorneys who are not on the list to receive e–mail notices for this case (who therefore require manual noticing). I served the following by email and Federal Express

Mark B. Mizrahi, Esq. (SBN 179384) Belasco Jacobs & Townsley, LLP 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

CASE NO. 08-CV-1166 IEG (POR)

DECLARATION OF WILLIAM N. KAMMER IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY

Date: August 28, 2008
Time: 2:00 p.m.

Hon. Louisa S. Porter

I, William N. Kammer, declare:

1. I am a partner in the firm of Solomon Ward Seidenwurm & Smith, LLP, and one of the attorneys responsible for the representation of Hansen Beverage Company in this matter. I have reviewed the Ex Parte Application for Discovery filed by Living Essentials on August 21, 2008, and I have personal knowledge of the matters that I set forth in this declaration. I make this Declaration primarily to discuss the irrationality of the unarticulated document requests in an age of electronic discovery and the amended Federal Rules of Civil Procedure.

REQUESTED PRODUCTION OF DOCUMENTS

2. Hansen's Opposition is difficult to express given the generality and breadth of

the description of the requested document discovery ["Fifteen (15) document requests … directed to the issues raised in the Hansen preliminary injunction motion and any Living Essentials' defenses, returnable fifteen (15) days from the date of service".] Who knows how many documents might be responsive to 15 unarticulated document requests? And anyone familiar with the work of the Sedona Conference would recognize that a 15-day return date for production is virtually impossible to achieve when dealing with ESI. Additionally, in this type of a case, meaningful discovery will not and cannot occur without the negotiation of a proposed protective order and its subsequent approval and entry by the Court. To my knowledge, the various counsel for Living Essentials have yet to broach the subject with our firm.

3. This Court is aware of the major changes in discovery practice that have followed the amendments to the Federal Rules in December, 2006. Of course, a request for and the production of ESI was always available, but the amendments, if not the MCLE providers, alerted our profession to the fact the ESI discovery had probably been regularly neglected. This Court also has considerable experience with its ENE procedures that originated with the passage of the Biden Bill, the Civil Justice Reform Act of 1990. Wisely there is ordinarily a discovery stay in all cases until after the ENE has occurred.

4. The unarticulated requests implicate ESI because of the addition of the phrase and definition of "electronically stored information" to Rule 34 in December, 2006, replacing the older phrase "data compilations". The problem with document and ESI production in our contemporary business environment is that an estimated 90% of documents are electronically produced and an estimated 80% of them are never printed out. They reside only in the various memory media of the personal computers and servers of the parties or in off-line storage media. Additionally, in most companies, the vast majority of that ESI is also in the form of e-mail and its attachments.

5. The wisdom of the 2006 Amendments is its imposition upon the parties of an early obligation to discuss the breadth, form, and ramifications of the discovery of ESI, given the fact that most "documents" today fall into that category. I have attended and taught

numerous courses and webinars over the past five years on electronic discovery and the best practices to conduct it. Most commentators advise parties to work together to devise a search methodology that will produce or "harvest" ESI that might be relevant and responsive to a production request. Most attorneys that I have worked with attempt to do so because it is in the best interests of all parties to minimize the expense of retrieving, harvesting, reviewing, and producing ESI.

6. That advice and the recommended best practices are derivative from three controlling factors: (1) a gigabyte of data might amount to 70,000-80,000 pages of text or images; (2) the data storage space a gigabyte requires only costs about $1.00 so it is seldom reviewed and culled for destruction; and (3) the value of the attorney time, at today's billing rates, necessary to review each gigabyte of data might approach $30,000. Most commentators agree that the volume of electronically stored information is probably exponentially greater than the volume of stored paper information. For that very reason, temperance, precision, and cooperation are crucial. Thus most judges insist upon a meaningful Rule 26(f) conference resulting in a meaningful discovery plan.

7. Most counsel are aware that electronic discovery costs in current business litigation may range in expense to their clients from $250,000 to more than a million dollars. Absent the meet-and-confer process, there is no reasonable way to control those expenses. Moreover most counsel are aware that the harvesting and review of ESI prior to production cannot reasonably occur with a 15-day return date.

8. Because most of the ESI of corporate clients is email, the challenges of appropriate ESI production are further compounded. The e-mail software used by many companies has mediocre search functions. Hansen uses Microsoft's Outlook. In Outlook, the software generally limits searches to a single word or an exact phrase. The challenge is finding all of the documents that might be responsive to a request without harvesting a vast number of documents dealing with irrelevant matters yet containing the name of a product, process, party, or witness. In order to do so, many companies must use other third-party software that allows logical or Boolean search phrases to harvest truly relevant materials

from the mass of stored data.

9. Living Essentials' unarticulated requests suggest no method to arrive at logical search phrases that would produce responsive and discoverable ESI, even if there were a compelling present need for its production.

10. Hansen's ESI basically resides on the individual computers of its employees and executives and on Hansen's computer servers. To the extent that the ESI is on personal computers, any search for responsive documents must occur in singular fashion on each employee's computer. Any ESI resident on servers can only be efficiently searched after an agreement between counsel to define and utilize search phrases appropriate to the task. That is really the only reasonable way to conduct an intelligent and economical search of Hansen's electronic data.

11. After the "harvest" of a substantial volume of ESI, counsel must determine an economical method for reviewing it, numbering its pages, and converting it into a producible form, *i.e.*, "petrifying" it. Unarticulated search terms, even broad ones, do nothing to assist agreement upon a reasonable production of relevant and discoverable ESI.

LIVING ESSENTIALS' WEBPAGES

12. I am familiar with the project colloquially referred to as The Wayback Machine but formally the Internet Archive, a non-profit corporation based at the Presidio in San Francisco. It works to preserve the content of the internet for generations to come, using robot "crawlers" or "spiders" to query regularly a vast number of Internet addresses and harvest the contents of many of the pages found at each of those urls. The front page for the project is now found at http://www.archive.org. I have used the Wayback Machine in many cases to obtain copies of information that appeared at earlier times on the internet at various web sites.

13. I am also familiar with the principal website for Living Essentials that is found at http://5hourenergy.com and also with several subsidiary pages with the addresses http://www.5hourenergy.com/crasheffect.asp and http://www.5hourenergy.com/QandA.asp. From the front page of the *5-hour Energy*® site, a visitor can reach the graphic expression of

Living Essentials' "Clinical Trial" at the crasheffect.asp page either by clicking on the word "crash" or on a button labeled "Crash Effect Explained". There is also on the toolbar of the front page a button labeled "FAQs". If a consumer clicks on that button, they are transported to the page QandA.asp.

14. At the website of the Wayback Machine, a visitor can enter the Internet address, the "URL", of any Internet site. I have done so on several recent occasions and again on August 26, 2008. I attach to this Declaration as Exhibit 1 the summary table produced when I last entered the address of Living Essentials' front page into the Wayback Machine. Exhibit 2 is the report that resulted when I last entered the URL of the crasheffect.asp page, and Exhibit 3 is the result when I last entered the URL of the QandA.asp page. The Internet Archive notes on each of those pages that it posts the results of its visits about six months after it has collected the material. That would explain the absence of any reported visits after February of this year.

15. The dates indicated in each of the columns of those exhibits are the dates when the Wayback Machine crawled through and captured or harvested the contents of the respective pages. The FAQs page of the Wayback Machine explains that the dates marked with an asterisk indicate that there were changes observed that day from the previous visit to that web address.

16. I personally did most of the work I describe below though I asked my legal assistant to go back and verify that I had accurately captured and printed the appearance and contents of the information and pages I will now discuss. In each instance of a date marked with an asterisk on the Exhibits, we have printed out the web page obtained and retained by the Wayback Machine and stored in its database. We have also "viewed" the "Page Source" of each of those pages, copying what is essentially the source code of that html page and then pasting it into a Word document that we retain in our files. ["Page Source" is the menu pick on the View menu on the Firefox browser; you can see the same information by using "Source" on the View menu of Internet Explorer.]

17. By examining those materials currently available at the Wayback Machine, I

was able to determine when the archived information suggests that certain information first appeared on the 5-Hour web pages. The "Crash Effect Explained" button was first observed on a 5-Hour web page captured by the Wayback Machine during a visit on December 6, 2007. The Wayback Machine had last visited that page on November 23. Thus the logical conclusion is that the insertion of that button onto the home page of *5-hour Energy*® was made after the November 23 visit and on or before December 6, 2007.

18. Similarly Exhibit 2 shows the capture results for the crasheffect.asp page and reports that the Wayback Machine first visited that page on December 9, 2007. That page, when visited, contains a series of bar graphs illustrating the results of the "Clinical Trial" that *5-hour Energy*® conducted. Exhibit 4 is a copy of the December 9, 2007, page as recorded by the Internet Archive. As I explained in paragraph 13, a consumer would reach that graphical representation by clicking on the "Crash Effects Explained" button or on the word "crash" on the front page of the web site.

19. Finally, Exhibit 3 reports the visits to the QandA.asp page on perhaps 50 occasions from 2005 through February 10, 2008. That web page consists of a number of questions and answers about the product. One of the present-day questions begins "If 5-Hour energy contains zero net carbohydrates, from where does it derive its energy?" and responds in part with a disclaimer that the product does not provide "physical energy". By examining the pages collected on the dates indicated on Exhibit 3, and the source code for those pages, I was able to determine that that question and its answer that *5-hour Energy*® does not contain any physical energy was never on any of the QandA.asp pages harvested by the Wayback Machine on any date through February 28, 2008. However it does presently appear on the Living Essentials web site.

20. While revising this declaration on Tuesday, August 26, I attempted to visit the web site http://5hourenergy.com but was not able to do so. I tried again on a number of occasions but found it non-responsive. I then attempted to "ping" the web site but each request timed out. Pinging is basically placing something similar to a phone call in an attempt to get the phone on the other side to respond. As of 9:30 a.m. on Wednesday,

August 27, 2008, the 5-Hour web site is still off line.

I declare under penalty of perjury under the laws of the United States of America that the preceding is true and correct and that I executed this Declaration on August 28, 2008.

William N. Kammer

William N. Kammer

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF WILLIAM N. KAMMER IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** to be served in the following manner:

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Daniel T. Pascucci, Esq. (SBN 166780) Nathan R. Hamler, Esq. (SBN 227765) Mintz Levin Cohn Ferris Glovsky and Popeo PC 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130 Telephone: (858) 314-1510 Facsimile: (858) 314-1501 dpascucci@mintz.com nhamler@mintz.com Attorneys for Innovation Ventures LLC dba Living Essentials	

Manual Notice List

The following is the list of attorneys who are not on the list to receive e–mail notices for this case (who therefore require manual noticing). I served the following by email and Federal Express

Mark B. Mizrahi, Esq. (SBN 179384) Belasco Jacobs & Townsley, LLP 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

INTERNET ARCHIVE WaybackMachine

Enter Web Address: http:// All Take Me Back Adv. Search Compare Archive Pages

Searched for http://5hourenergy.com **97** Results

Note some duplicates are not shown. See all.
* denotes when site was updated.
Material typically becomes available here 6 months after collection. See FAQ.

Search Results for Jan 01, 1996 - Feb 28, 2008

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	9 pages	56 pages	25 pages	3 pages
									Oct 13, 2005 *	Jan 05, 2006	Jan 01, 2007	Jan 05, 2008 *
									Nov 23, 2005 *	Jan 06, 2006	Jan 06, 2007	Jan 17, 2008
									Nov 24, 2005	Jan 10, 2006	Jan 11, 2007 *	Feb 09, 2008 *
									Nov 25, 2005	Jan 11, 2006	Jan 16, 2007	
									Dec 08, 2005	Jan 13, 2006	Jan 21, 2007	
									Dec 10, 2005 *	Feb 02, 2006	Jan 26, 2007 *	
									Dec 11, 2005	Feb 04, 2006	Feb 02, 2007 *	
									Dec 14, 2005 *	Feb 05, 2006	Feb 03, 2007	
									Dec 25, 2005	Feb 17, 2006 *	Feb 10, 2007 *	
										Feb 22, 2006	Apr 06, 2007 *	
										Mar 02, 2006 *	Apr 16, 2007 *	
										Mar 09, 2006	Apr 17, 2007	
										Mar 21, 2006	May 18, 2007 *	
										Mar 24, 2006	Jun 07, 2007 *	
										Mar 26, 2006	Jun 18, 2007	
										Mar 28, 2006	Jul 09, 2007 *	
										Apr 17, 2006	Aug 17, 2007 *	
										Apr 19, 2006	Sep 28, 2007 *	
										Apr 22, 2006	Oct 11, 2007 *	
										Apr 24, 2006	Oct 22, 2007	
										Apr 25, 2006	Nov 01, 2007	
										Apr 26, 2006	Nov 12, 2007	
										May 02, 2006	Nov 23, 2007	
										May 03, 2006	Dec 06, 2007 *	
										May 04, 2006		

Exhibit 1.1

May 20, 2006 * Dec 21, 2007 *
May 23, 2006
May 24, 2006
Jun 12, 2006
Jun 13, 2006
Jun 15, 2006
Jun 16, 2006
Jun 22, 2006 *
Jul 03, 2006
Jul 06, 2006
Jul 10, 2006
Jul 14, 2006
Jul 15, 2006
Jul 16, 2006
Jul 18, 2006
Aug 04, 2006 *
Aug 10, 2006 *
Aug 20, 2006
Aug 21, 2006
Aug 22, 2006
Aug 23, 2006
Aug 31, 2006
Sep 02, 2006
Oct 04, 2006
Nov 09, 2006
Nov 16, 2006
Nov 24, 2006 *
Dec 02, 2006
Dec 05, 2006
Dec 15, 2006
Dec 23, 2006

Exhibit 1.2

INTERNET ARCHIVE WaybackMachine

Enter Web Address: http:// All Take Me Back Adv. Search Compare Archive Pages

Searched for **http://5hourenergy.com/crasheffect.asp** **3** Results

* denotes when site was updated.
Material typically becomes available here 6 months after collection. See FAQ.

Search Results for Jan 01, 1996 - Feb 28, 2008

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	2 pages	1 pages
											Dec 09, 2007 *	Feb 14, 2008
											Dec 29, 2007 *	

Home | Help

Internet Archive | Terms of Use | Privacy Policy

Exhibit 2.1

INTERNET ARCHIVE WaybackMachine

Enter Web Address: http:// All Take Me Back Adv. Search Compare Archive Pages

Searched for http://5hourenergy.com/QandA.asp **50** Results

Note some duplicates are not shown. See all.
* denotes when site was updated.
Material typically becomes available here 6 months after collection. See FAQ.

Search Results for Jan 01, 1996 - Feb 28, 2008

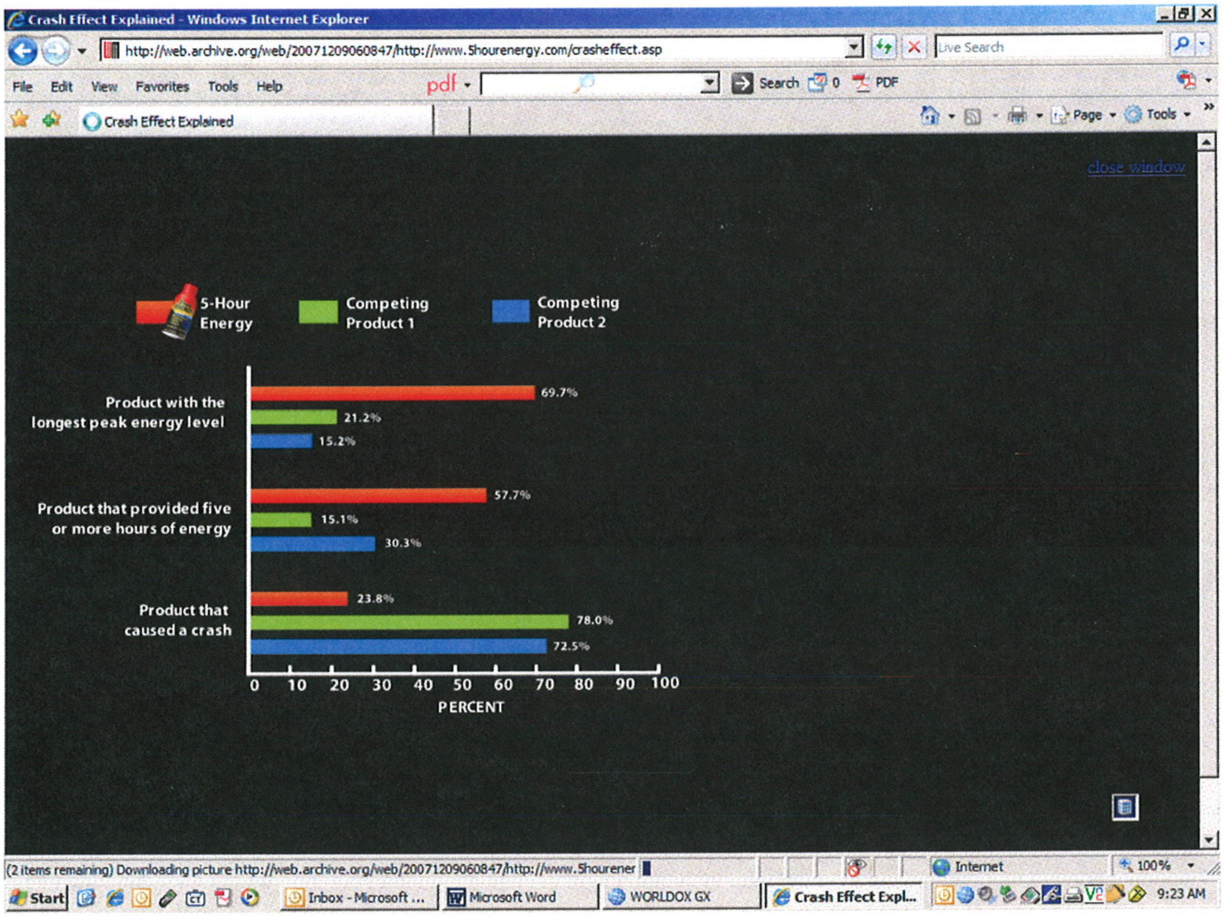
1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	0 pages	3 pages	22 pages	19 pages	3 pages
									Nov 24, 2005 *	Jan 11, 2006	Jan 04, 2007 *	Jan 02, 2008 *
									Dec 10, 2005 *	Feb 04, 2006	Jan 08, 2007	Jan 21, 2008
									Dec 17, 2005 *	Feb 05, 2006	Jan 13, 2007 *	Feb 10, 2008 *
										Mar 24, 2006 *	Jan 19, 2007 *	
										Mar 26, 2006	Jan 29, 2007 *	
										Apr 04, 2006	Feb 05, 2007	
										Apr 24, 2006	Feb 12, 2007 *	
										Apr 25, 2006	Feb 20, 2007	
										Apr 26, 2006	Mar 06, 2007	
										May 03, 2006	Mar 15, 2007	
										May 23, 2006 *	Apr 30, 2007 *	
										Jun 12, 2006	May 22, 2007 *	
										Jun 13, 2006	Jun 22, 2007 *	
										Jun 15, 2006	Jul 01, 2007	
										Jul 08, 2006 *	Jul 09, 2007 *	
										Jul 14, 2006	Aug 10, 2007 *	
										Jul 20, 2006	Oct 11, 2007 *	
										Aug 05, 2006 *	Nov 11, 2007 *	
										Aug 12, 2006	Dec 09, 2007 *	
										Aug 19, 2006		
										Aug 21, 2006		
										Nov 05, 2006 *		

Home | Help

Exhibit 3.1

Internet Archive | Terms of Use | Privacy Policy

Exhibit 3.2


Crash Effect Explained - Windows Internet Explorer
http://web.archive.org/web/20071209060847/http://www.5hourenergy.com/crasheffect.asp
Crash Effect Explained
close window
5-Hour Energy
Competing Product 1
Competing Product 2
Product with the longest peak energy level
69.7%
21.2%
15.2%
Product that provided five or more hours of energy
57.7%
15.1%
30.3%
Product that caused a crash
23.8%
78.0%
72.5%
0 10 20 30 40 50 60 70 80 90 100
PERCENT
(2 items remaining) Downloading picture http://web.archive.org/web/20071209060847/http://www.5hourener
Internet
100%
Start
Inbox - Microsoft ...
Microsoft Word
WORLDOX GX
Crash Effect Expl...
9:23 AM

Crash Effect Explained

close window

The term "crash effect" used in 5-Hour Energy advertising refers to a reduction in energy levels below baseline. Baseline energy levels are those present immediately before ingestion of an energy drink. These are graphs taken from a clinical trial studying the effects of 5-Hour Energy and two competing energy drinks.

Comparison Chart

All participants in the clinical trial, including those who consumed 5-Hour Energy, experienced a spike in energy levels followed by an eventual reduction in those levels some time after drink ingestion. 5-Hour Energy contains no sugar but the competing drinks studied did. Only those consuming the competing drinks containing sugar experienced a reduction in energy levels below baseline (i.e., below the level present immediately before the drink was consumed). Sugar in the range of 20mg or more per serving can induce elevation in blood glucose levels. Elevated blood glucose levels can, in turn, increase insulin production. Insulin suppresses blood glucose levels and may produce a "crash" effect, which is a reduction in energy levels below baseline.

close window

NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **DECLARATION OF EDWARD J. MCINTYRE IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** Date: August 28, 2008 Time: 2:00 p.m. Hon. Louisa S. Porter

Edward J. McIntyre declares:

1. I am a member of the bar of this Court and an attorney for Hansen Beverage Company in this action.

2. I personally reviewed the docket entries in *Innovation Ventures, LLC v. N2G Distributing, Incorporated, et al.*, United States District Court, Eastern District of Michigan, Case No. 2:08-cv-10983-PDB-MJH, and reviewed Innovation Ventures brief in support of its motion for a TRO and preliminary injunction, N2G's response and N2G's emergency motion for expedited discovery.

3. That emergency motion focused on the collateral issue of a list of recipients of the letter Innovation Ventures' counsel sent to distributors, wholesalers and retailers along with a copy of the complaint.

4. Neither Innovation Ventures' motion nor N2G's response appear to rely on any discovery taken for that motion nor is there any evidence of other expedited discovery. Innovation Ventures argued that the court could find irreparable injury as a matter of law.[1]

I declare under penalty of perjury under the laws of the United States of America that the preceding is true and correct and that I executed this declaration on August 27, 2008 in San Diego, California.

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

[1] Innovation Ventures' brief, pp. 16-17.

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF EDWARD J. MCINTYRE IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** to be served in the following manner:

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Daniel T. Pascucci, Esq. (SBN 166780) Nathan R. Hamler, Esq. (SBN 227765) Mintz Levin Cohn Ferris Glovsky and Popeo PC 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130 Telephone: (858) 314-1510 Facsimile: (858) 314-1501 dpascucci@mintz.com nhamler@mintz.com Attorneys for Innovation Ventures LLC dba Living Essentials	

Manual Notice List

The following is the list of attorneys who are not on the list to receive e–mail notices for this case (who therefore require manual noticing). I served the following by email and Federal Express

Mark B. Mizrahi, Esq. (SBN 179384) Belasco Jacobs & Townsley, LLP 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** Date: August 28, 2008 Time: 2:00 p.m. Hon. Louisa S. Porter

Hansen Beverage Company requests the Court to take judicial notice, pursuant to Federal Rule of Evidence 201 of the following:

Exhibit No. 1: Hansen's complaint;

Exhibit No. 2: Living Essentials' Supplemental Registration filed with the United States Patent and Trade Office;

Exhibit No. 3: Living Essentials' brief in support of its request for a temporary restraining order and preliminary injunction, in *Innovation Ventures, LLC d/b/a/ Living Essentials v. N2G Distributing , Inc.* 2008 U.S. Dist. LEXIS 30047 (E.D. Mich. April 14, 2008).

DATED: August 27, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: /s/ Edward J. McIntyre
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

CERTIFICATE OF SERVICE

I caused the **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO LIVING ESSENTIALS' *EX PARTE* APPLICATION FOR DISCOVERY** to be served in the following manner:

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Daniel T. Pascucci, Esq. (SBN 166780) Nathan R. Hamler, Esq. (SBN 227765) Mintz Levin Cohn Ferris Glovsky and Popeo PC 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130 Telephone: (858) 314-1510 Facsimile: (858) 314-1501 dpascucci@mintz.com nhamler@mintz.com Attorneys for Innovation Ventures LLC dba Living Essentials	

Manual Notice List

The following is the list of attorneys who are not on the list to receive e–mail notices for this case (who therefore require manual noticing). I served the following by email and Federal Express

Mark B. Mizrahi, Esq. (SBN 179384) Belasco Jacobs & Townsley, LLP 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

FILED
08 JUL -1 AM 10: 11
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: ECL DEPUTY

NORMAN L. SMITH [SBN 106344]
nsmith@swsslaw.com
EDWARD J. MCINTYRE [SBN 80402]
emcintyre@swsslaw.com
ALISON L. PIVONKA [SBN 156977]
apivonka@swsslaw.com
SOLOMON WARD SEIDENWURM & SMITH, LLP
401 B Street, Suite 1200
San Diego, California 92101
Telephone: (619) 231-0303
Facsimile: (619) 231-4755

Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. '08 CV 1166 IEG POR **COMPLAINT FOR FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200 AND 17500 AND TRADE LIBEL** **AND** **JURY TRIAL DEMAND**

CR

PREAMBLE

This case involves a seller of energy drinks who, instead of allowing its products to speak for themselves in the marketplace, resorted to false advertising and trade libel in order to try to boost its own position and diminish Hansen's. The Lanham Act and California law provide Hansen with remedies for the false advertising and trade libel that has harmed its commercial interests.

PARTIES

Plaintiffs.

1. Hansen Beverage Company is a Delaware corporation, licensed to do business in California, with its principal place of business in Corona, California.

2. Since 1992, Hansen has developed, marketed, sold, and distributed non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas.

Defendant.

3. Innovation Ventures, LLC dba Living Essentials is, Hansen is informed and believes, a Michigan corporation with its principal place of business in Novi, Michigan. Living Essentials conducts business in this district.

4. Living Essentials commercially advertises and markets in interstate commerce competing energy drinks, each of which it publicly claims and represents, *inter alia*, produces five hours of energy.

JURISDICTION

5. Because this civil action arises under the Lanham Act, 15 U.S.C. §§ 1051, *et seq.*, and specifically 15 U.S.C. § 1125(a)(1)(B), this Court has jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a).

6. This Court also has subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1332(a)(1) in that it is a civil action between citizens of different states, namely, California and Delaware and Michigan, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Exhibit 1.2

7. Finally, this Court has subject matter jurisdiction over Hansen's California unfair competition and false advertising claims pursuant to 28 U.S.C. § 1338(b), in that these claims are joined with a substantial related claim under the Lanham Act and this Court also has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367(a).

VENUE

8. Venue in this district is proper pursuant to the provisions of 28 U.S.C. § 1391(b).

MATERIAL ALLEGATIONS

Hansen.

9. Hansen's energy drinks have been extremely successful and are sold throughout the United States by more than 100,000 retail stores, including convenience stores, gas stations, supermarkets, club stores, drug stores and warehouse stores.

10. In 1997 Hansen introduced Hansen's® Energy Drinks.

11. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The line of Monster Energy® drinks has since grown to include the Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dresses.

12. In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen introduced Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink.

13. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

14. Hansen's energy drinks have achieved significant success in commerce throughout the United States and are favored energy drinks for millions of customers.

Living Essentials.

15. Living Essentials' 5-HOUR *ENERGY*® drinks are competing energy-drink products that Living Essentials markets and sells in interstate commerce throughout the United States.

Exhibit 1.3

16. Living Essentials advertises its 5-HOUR *ENERGY*® drinks in commercial advertising across the United States.

17. Rather than engage in fair competition in the marketplace, however, and allow consumers to exercise their own choice, Living Essentials has resorted to false advertising and trade libel to attempt to promote its 5-HOUR *ENERGY*® drinks and falsely to discourage customers from using or purchasing Hansen's energy drinks.

The False Advertising Claims.

18. Indeed, the name, "5-HOUR *ENERGY*®," is, in and of itself, false and misleading precisely because it states, or at a minimum implies, that two ounces of a 5-HOUR *ENERGY*® drink produces a sustained level of "energy" for five hours. This is untruthful based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology.

19. One 5-HOUR *ENERGY*® commercial states:

> Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. But with 5-Hour Energy you could sail through your day with no jitters or crash. It contains B Vitamins for energy and amino acids for focus, zero sugar and only 8 calories. Drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours. 5-Hour Energy. Hours of energy now. No crash later. Available at these fine stores.

20. Living Essentials' claim that "with 5-HOUR *ENERGY*® you could sail through your day with no jitters or crash" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, a false and misleading statement of material fact about 5-HOUR *ENERGY*®.

21. Living Essentials' claim that 5-HOUR *ENERGY*® "contains B Vitamins for energy and amino acids for focus" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

22. Living Essentials' claim that with 5-HOUR *ENERGY*® one can "drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

23. Living Essentials' claims in this as well as additional advertisements that 5HOUR *ENERGY*™ provides "Hours of energy now. No crash later" are, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

24. Another 5-HOUR *ENERGY*® commercial states:

> Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a dehabilitating crash. So don't drink energy drinks, drink 5-Hour Energy. It's not a drink, more like a sip. Well with that sip you'll feel alert and focused for hours, without the crash or jitters. It has zero sugar, only 4 calories and no guarana. 5-Hour Energy. Hours of energy now. No crash later.

25. Living Essentials' claim in this as well as additional advertisements that "you'll feel alert and focused for hours without the crash or jitters" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

26. Living Essentials' claim in this as well as additional advertisements that 5-HOUR *ENERGY*® provides "Hours of energy now. No crash later" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

27. And another advertisement claims:

> This is you after an energy drink. Unfortunately, so is this. Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. That's why you should try a new liquid energy shot called 5 Hour Energy. With 5 Hour Energy, you can leave grogginess behind and sail through your day without feeling jittery, tense or, you know. That's because 5 Hour Energy contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood. There is zero sugar, about as much caffeine as a cup of coffee and only 4 calories. The 2-ounce shot takes just seconds to drink and in minutes you're feeling bright, awake and productive and that feeling lasts for hours. So if your energy drink makes you crash, switch to 5 Hour Energy. Hours of energy now, no crash later. Find out if 5 Hour Energy is right for you. It's available at these fine stores, or for more information go to 5hourenergy.com.

28. Living Essentials' claims in this as well as additional advertisements that 5-HOUR *ENERGY*® provides "Hours of energy now. No crash later" are, based on the drink's

ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading

29. Living Essentials' claim in this as well as additional advertisements that "with 5-HOUR *ENERGY*® you can leave grogginess behind and still do your day without feeling jittery and tense or, you know" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

30. Living Essentials' claim in this as well as additional advertisements that "5-HOUR *ENERGY*® contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood," is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

31. In addition, 5-HOUR *ENERGY*® conspicuously makes the following claims on each drink's container:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes • Lasts for hours"
- "Sugar free"
- "0 net carbs"

32. 5-HOUR *ENERGY*® Decaf conspicuously makes the following claims on each drink's container:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes • Lasts for hours"
- "Sugar free"
- "Decaf"
- "Only 4 calories"

33. 5-HOUR *ENERGY*® EXTRA STRENGTH conspicuously claims on each drink's container:

- "Sugar free"
- "Only 4 calories"

34. Living Essentials' claims in the quoted advertisements and/or on the product containers that 5-HOUR *ENERGY*® products provide "hours of energy now," or "sail through your day with no jitters or crash," or "in minutes you're feeing alert and productive and that

feeling lasts for hours 5-Hour Energy," or "Hours of energy now. No crash later," or "Feel it in minutes lasts for hours" are, based on 5-HOUR *ENERGY*®'s ingredients, at least as disclosed on the applicable product container labels, false and misleading based on generally accepted principles of biochemistry, pharmacology and physiology and cannot and do not produce the effects claimed.

35. Living Essentials' claims in advertisements that its 5-HOUR *ENERGY*® products make the drinker "feel alert and focused for hours, without the crash or jitters" are, based on the products' ingredients, at least as disclosed on the applicable product container labels, false and misleading, given generally accepted principles of biochemistry, pharmacology and physiology, and do not and cannot produce the effects claimed.

36. 5-HOUR *ENERGY*® Decaf's ingredients, at least as disclosed—"sugar free," "Decaf," "6 mg. of caffeine," "only 4 calories"—given generally accepted principles of biochemistry, pharmacology and physiology, do not and cannot provide "Hours of energy now," "Feel it in minutes • Lasts for hours," "No crash later," as Living Essentials claims. Those claims are further false and misleading based on the products' ingredients including, in particular, the limited amount of caffeine and sugar in the products, at least as disclosed on the applicable container labels.

37. 5-HOUR *ENERGY*® Extra Strength's claims, described in paragraphs 18-30 and 33 above, including its claim derived from the name of the product itself, are false and misleading based on the product's claims to be "sugar free" and "only 4 calories" and the product's other ingredients at least as disclosed on the applicable container labels, given generally accepted principles of biochemistry, pharmacology and physiology.

The Trade Libel.

38. Living Essentials' statements that energy drinks contain "12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk." falsely disparages energy drinks in general that contain some or all the ingredients to which Living Essentials refers, because such statements falsely impute adverse characteristics to and consequences of such ingredients. Such statements constitute a trade libel of and/or against energy drinks in

general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

39. Living Essentials' statements that energy drinks are "good for short jittery bursts, then a dehabilitating crash" are false and misleading statements, and by clear reference and/or inference falsely, disparage energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

40. Living Essentials' statement "why do energy drinks make you crash" is false and misleading and constitutes trade libel in that by clear reference and/or by inference it falsely disparages energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

41. Living Essentials' statements, "One minute you're wired up. The next you feel worse than before" are false and misleading and constitute trade libel in that, by clear reference and/or by inference they falsely disparage energy drinks in general, including Hansen's energy drinks which fall within a class of drinks known as energy drinks. Such statements suggest that energy drinks in general, including Hansen's energy drinks, contain large amounts of sugar and caffeine which produce results that 5-HOUR *ENERGY*® drinks do not despite the fact that 5-HOUR *ENERGY*® drinks contain even higher levels of caffeine than Hansen's energy drinks. Such claims about Hansen's energy drinks are in any event false and misleading.

42. Living Essentials' statement, "the answer is large amounts of sugar and caffeine" is false and misleading and constitutes trade libel in that it falsely disparages energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

43. Living Essentials' statement that "with 5-HOUR *ENERGY*® you can leave grogginess behind and still do your day without feeling jittery and tense or, you know" is false and misleading and constitutes trade libel in that it falsely disparages energy drinks in general, including Hansen's energy drinks which fall under the claim of drinks known as energy drinks.

44. The statements quoted above are false and misleading statements of material fact about Living Essentials' own products and also, by clear inference, about Hansen's energy drinks, such that they are likely to influence the purchasing decisions of a substantial number of reasonable consumers and actually deceive or have the tendency to deceive a substantial segment of the reasonable consumer audience.

45. All such statements constitute false advertising that Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and also California's unfair competition law, Business & Professions Code §§ 17200 and 17500, prohibit.

46. Worse, the effect such advertising has, and will have, on reasonable consumers makes Living Essentials' false claims about itself and its false statements about Hansen energy drinks even more pernicious.

FIRST CLAIM FOR RELIEF

[FALSE ADVERTISING—VIOLATION OF 15 U.S.C. § 1125(a)]

47. Hansen incorporates by this reference paragraphs 1 through 46, above.

48. Hansen sells beverages in interstate commerce throughout the United States.

49. Living Essentials sells its 5-HOUR *ENERGY*® products in interstate commerce throughout the United States and it competes with Hansen's energy drinks.

50. Living Essentials engages in commercial advertising in interstate commerce across the United States.

51. Living Essentials' advertisements contain false and misleading statements of fact concerning its own product.

52. In addition, Living Essentials' advertisements contain false and misleading statements of fact that the reasonable consumer would readily impute, and/or is likely readily to impute, to energy drinks in general and to Hansen's energy drinks in particular.

53. Living Essentials' false and misleading commercial advertising in interstate commerce violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), in that: it contains false and misleading statements of fact in commercial advertising about its own products and about Hansen's products; those representations are material; they are likely to influence the

purchasing decision of a substantial number of reasonable consumers; those misrepresentations actually deceive or, at a minimum, have the tendency to deceive a substantial segment of the reasonable consumer audience; and, Hansen has been injured, and in the future is likely to continue to be injured, as a result of the misrepresentations, both by the direct diversion of sales from Hansen to Living Essentials and by a lessening of the goodwill associated with Hansen's products.

54. As a direct and proximate result, Hansen has suffered injury and harm and will continue to suffer such harm, including money damages in excess of $75,000, exclusive of interest and costs, the exact amount of which Hansen will prove at trial.

55. Hansen is informed and believes that Living Essentials' false and misleading advertising is willful.

56. Hansen has no adequate remedy at law with respect to Living Essentials' future false and misleading commercial advertising precisely because Hansen is informed and believes that Living Essentials will continue in its same course of conduct unless and until it has been restrained by an order of this Court.

SECOND CLAIM FOR RELIEF

[FALSE ADVERTISING—CALIFORNIA LAW]

57. Hansen incorporates by this reference paragraphs 1 through 56, above.

58. Living Essentials' conduct, as alleged above, violates the misbranding provisions of the Federal Food, Drug and Cosmetic Act, 21 USC §§ 343 and 350, which make the false or misleading labeling of, *inter alia*, dietary and vitamin supplements unlawful and illegal.

59. In addition, Living Essentials' conduct, as alleged above, violates § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in that it constitutes an unfair method of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce.

60. Living Essentials' conduct, as alleged above, constitutes false advertising and unfair competition pursuant to the provisions of Business & Professions Code §§ 17200 and

17500.

61. As a direct and proximate result, Hansen has suffered injury and harm and will continue to suffer injury and harm both by the direct diversion of sales from Hansen to Living Essentials and by a lessening of the goodwill associated with Hansen's products.

62. Hansen has no adequate remedy at law with respect to Living Essentials' future false and misleading commercial advertising precisely because Hansen is informed and believes that Living Essentials will continue in its same course of conduct unless and until it has been restrained by an order of this Court.

THIRD CLAIM FOR RELIEF

[TRADE LIBEL]

63. Hansen incorporates by this reference paragraphs 1 through 62, above.

64. By virtue of all of Living Essentials' false and misleading statements as set forth above, and by singling out Hansen's energy drinks by their well-known ingredients, Living Essentials' has engaged in the intentional disparagement of the quality of energy drinks in general and of Hansen's energy drinks in particular, resulting in the money damages that Hansen has suffered.

65. As a direct and proximate result of all of Living Essentials' false and misleading statements as set forth above and also as a direct and proximate result of Living Essentials' trade libel and intentional disparagement of the quality of energy drinks in general and of Hansen's energy drinks in particular, Hansen has suffered money damages in an amount not presently known, but in excess of $75,000, exclusive of interests and costs, and which will be proved at trial.

66. Living Essentials' conduct constitutes an intentional misrepresentation and false, defamatory statements, all with the intention of causing injury to Hansen and is oppressive, fraudulent and malicious conduct as defined in California Civil Code § 3294. Hansen should recover, in addition to its actual damages, exemplary and punitive damages according to proof.

WHEREFORE, Hansen Beverage Company prays for relief against Living Essentials as follows:

1. For preliminary and permanent injunctive relief against Living Essentials pursuant to 15 U.S.C. §§1116 and 1125(a) and Business & Professions Code § 17203;

2. For an award of money damages;

3. For the recovery of Living Essentials' illegal and unjust profits;

4. For three times Hansen's actual money damages;

5. For a finding that Living Essentials' conduct constitutes an exceptional case, such that Hansen is entitled to its attorneys fees in addition to its costs and expenses of suit;

6. For disgorgement of Living Essentials' illegal and unjust profits;

7. For punitive and exemplary damages; and,

8. For such other and further relief as this Court deems just and proper.

DATED: July 1, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: [signature]
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

DEMAND FOR JURY

Hansen Beverage Company demands a jury trial of all claims triable by a jury.

DATED: July 1, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: [signature]
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INNOVATION VENTURES, LLC,
d/b/a LIVING ESSENTIALS,
a Michigan limited liability company,

Plaintiff,

vs.

Hon. PAUL D. BORMAN

CIVIL ACTION NO. 2:08-CV-10983

N2G DISTRIBUTING, INC.,
a California corporation, and

ALPHA PERFORMANCE LABS,
a Nevada corporation,

Defendants.

JURY TRIAL DEMANDED

MARK A. CANTOR (P32661)
MARC LORELLI (P63156)
BROOKS KUSHMAN P.C.
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(248) 358-4400

Attorneys for Plaintiff

PLAINTIFF LIVING ESSENTIALS' BRIEF IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ISSUE PRESENTED v

I. INTRODUCTION 1

II. BACKGROUND FACTS 3

III. ARGUMENT 7

IV. LIVING ESSENTIALS IS HIGHLY LIKELY TO SUCCEED ON THE MERITS 8

A. There Is Clearly A Likelihood Of Confusion Between Living Essentials' 5 HOUR ENERGY® Trademark And Packaging Trade Dress And Defendants' Imitation 9

B. 5 HOUR ENERGY® Is A Widely Used And Powerful Trademark 13

C. The Sunrise Climber Trade Dress Is Inherently Distinctive And Non-Functional 15

V. HARM TO LIVING ESSENTIALS' TRADEMARK IS PRESUMPTIVELY IRREPARABLE 16

VI. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN LIVING ESSENTIALS' FAVOR 18

VII. THE PUBLIC INTEREST WILL BE ADVANCED BY A PRELIMINARY INJUNCTION 19

VIII. CONCLUSION 20

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

Exhibit 2.2

TABLE OF AUTHORITIES

CASES

Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.,
280 F.3d 619 (6th Cir. 2002) 14, 15

AMF, Inc. v. Sleekcraft Boats,
559 F.2d 341 (9th Cir. 1979) 11

Aveda Corp. v. Evita Marketing, Inc.,
706 F.Supp. 1419 (D. Minn. 1989) 17

Bauer Lamp Co. v. Shaffer,
941 F.2d 1165 (11th Cir. 1991) 11

Circuit City Stores, Inc. v. CarMax, Inc.,
165 F.3d 1047 (6th Cir. 1999) 16

DAP Products v. Color Tile Manufacturing,
821 F.Supp. 488 (S.D. Ohio 1993) 14

Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Center,
109 F.3d 275 (6th Cir. 1997) 10

Dive 'N Surf, Inc. v. Anselowitz,
834 F.Supp. 379 (M.D. Fla. 1993) 10

Ferrari S.PA.Esercizio Fabriche Automobili e Corse v. Roberts,
944 F.2d 1235 (6th Cir. 1991) 10, 11, 14

Fotomat Corp. v. Photo Drive-Thru, Inc.,
425 F.Supp. 693 (D. N.J. 1977) 17

Friendship Materials, Inc. v. Michigan Brick, Inc.,
679 F.2d 100 (6th Cir. 1982) 7

Frisch's Restaurants v. Elby's Big Boy, Inc.,
670 F.2d 642 (6th Cir. 1982) 12

Heinz v. Frank Lloyd Wright Foundation
1986 WL 5996 19

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

Interpace Corp. v. Lapp, Inc,
721 F.2d 460 (3d Cir. 1983) 11

Liquid Glass Enterprises v. Dr. Ing. h.c.F. Porsche AG,
8 F.Supp.2d 398 (D. N.J. 1998) 17

Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.,
43 F.3d 922 (4th Cir. 1995) 8

McPherson v. Michigan High Sch. Athletic Ass'n,
119 F.3d 453 (6th Cir. 1997) 7

Minnesota Mining and Manufacturing Company v. Taylor,
21 F.Supp.2d 1003 (D. Minn. 1998) 18

Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.,
290 F.3d 578 (3d Cir. 2002) 19

Opticians Ass'n of America v. Craftex, Inc.
816 F.2d 145 (4th Cir. 1987) 16

Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.,
687 F.2d 563 (2d Cir. 1982) 11

Polo Fashions v. Craftex, Inc.,
816 F.2d 145 (4th Cir. 1987) 10

Estate of Presley v. Russen,
513 F.Supp. 1339 (D. N.J. 1981) 19

Qualitex Co. v. Jacobson Products Co.
514 U.S. 159 (1995) 15

Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.,
134 F.3d 749 (6th Cir. 1998) 7

Topps Co. v. Gerrit J. Verburg Co.
1996 WL 719381 11

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

Exhibit 2.4

Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean (In re Delorean Motor Co.),
755 F.2d 1223 (6th Cir. 1985) 7

Wal-Mart, Inc. v. Samara Bros., Inc.,
529 U.S. 205 (2000) 15

STATUTES

15 U.S.C. § 1052 14

15 U.S.C. § 1114 8

15 U.S.C. § 1125 . . . . 8, 15

BK

Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

ISSUE PRESENTED

Whether a temporary restraining order and preliminary injunction should issue enjoining Defendants from further infringement of Plaintiff's 5 HOUR ENERGY® Trademark and Packaging Trade Dress rights in connection with their advertising and sale of a knock-off product pending the judgment in this case?

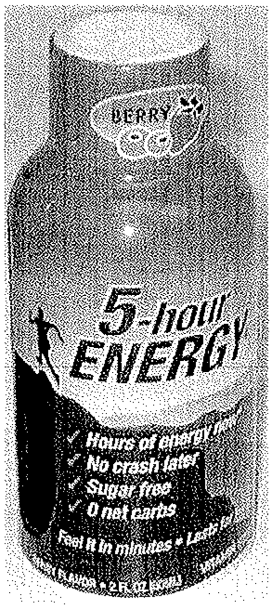
Plaintiff Living Essentials answers: *Yes*

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

I. INTRODUCTION

Over the last three and one-half years, plaintiff Innovations Ventures, LLC d/b/a Living Essentials ("Living Essentials") has sold a supplement under the 5 HOUR ENERGY® Trademark and Packaging Trade Dress as illustrated below.



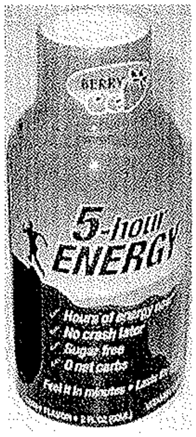
The 5 HOUR ENERGY® supplement has been widely successful. In just over three years, revenue from the sales of the 5 HOUR ENERGY® product has exceeded $110,000,000. Living Essentials has also invested substantially in advertising and marketing. Living Essentials has spent over $30,000,000 in advertising and marketing in connection with the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. These sales and expenditures demonstrate the strength of Living Essentials' brand. Indeed, the 5 HOUR ENERGY® supplement is one of the most, if not the most, successful supplements on the market today.

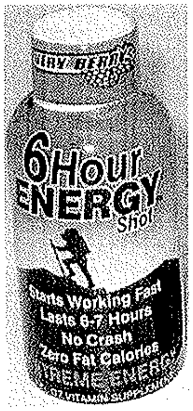
BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

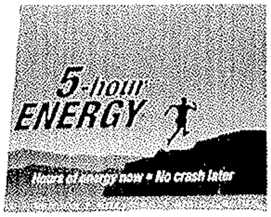
Tel (248) 358-4400
Fax (248) 358-3351

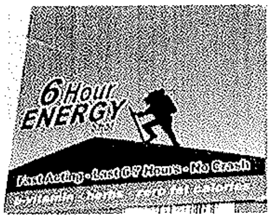
Exhibit 2.7

In an effort to trade on Living Essentials' successful and recognized brand, the defendants N2G Distributing, Inc. and Alpha Performance Labs (collectively "Defendants") have *just recently introduced* a supplement that includes a knock-off of Living Essentials' mark. As shown below, Defendants copied everything from the terrain climber at sunrise bottle to the box that the supplements are shipped and displayed in.


5-hour
ENERGY
No crash later
Sugar free
0 net carbs


6Hour
ENERGY
Shot
Starts Working Fast
Lasts 6-7 Hours
No Crash
Zero Fat Calories


5-hour
ENERGY
No crash later


6Hour
ENERGY

LIVING ESSENTIALS **DEFENDANTS**

Living Essentials seeks a temporary restraining order and preliminary injunction against Defendants to prevent Defendants' unauthorized use of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. There is a strong likelihood of success on the merits. Indeed, in the Sixth Circuit, copying creates a presumption of likelihood of confusion —

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

the touchstone of Living Essentials' claims in this case. Also, every day that the Defendants are allowed to offer to sell and distribute, Living Essentials is irreparably harmed. Living Essentials has essentially lost the ability to control which products its reputation and goodwill are being used to promote or endorse. This lack of control and potential damage to Living Essentials' reputation constitutes irreparable injury because monetary damages cannot adequately compensate for this harm to Plaintiff's goodwill and reputation.

II. BACKGROUND FACTS

The facts set forth in this section are supported by the Declaration of Scott Henderson, attached hereto as Exhibit D.

1. Plaintiff, Innovation Ventures, LLC, d/b/a Living Essentials (hereinafter "Living Essentials"), is a Michigan limited liability company, having its principal offices at 46570 Humboldt Drive, Novi, Michigan 48377.

2. Living Essentials is a national marketer and distributor of nutritional and dietary supplements sold under its many trademarks.

3. Living Essentials is the owner of the 5 HOUR ENERGY® Trademark used by Living Essentials since September 2004 as a trademark for use with the 5 HOUR ENERGY® supplement.

4. The 5 HOUR ENERGY® Trademark was duly and lawfully registered on September 27, 2005 and is currently registered on the Supplemental Register in the United States Patent and Trademark Office as U.S. Registration No. 3,003,077 ("the '077 registration"). A copy

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

of the Certificate of Registration for this Trademark is attached as Exhibit A to the Henderson Declaration.

5. Living Essentials has used the 5 HOUR ENERGY® Trademark of the '077 registration as its trademark continuously since September 2004 to the present in connection with its supplements, including in connection with promotion, marketing and advertising of supplements.

6. Living Essentials is the owner of the 5 HOUR ENERGY® Packaging Trade Dress used since September 2004 by Living Essentials as packaging for its 5 HOUR ENERGY® product in connection with its supplements, including in connection with promotion, marketing and advertising of supplements, for sale throughout the United States.

7. The 5 HOUR ENERGY® Packaging Trade Dress consists of the packaging illustrated in Exhibit B to the Henderson Declaration. The 5 HOUR ENERGY® Packaging Trade Dress includes the terrain climber at sunrise design, the color scheme, the presentation of the 5 HOUR ENERGY® Trademark, and the shape of the bottle which includes a short neck and a main container with broad shoulders.

8. The 5 HOUR ENERGY® Packaging Trade Dress is arbitrary, non-functional, and distinctive. The terrain climber at sunrise bottle is not essential to the use or purpose of the supplement and does not affect the cost or quality of the supplement. Instead, the terrain climber at sunrise bottle is an arbitrary and fanciful design that is used for source identification.

9. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress has been extensively, continuously, and exclusively used by Living Essentials since September 2004, is

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

inherently distinctive, and has become distinctive through the acquisition of "secondary meaning." Living Essentials has spent over $30,000,000 in advertising and marketing related to the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Living Essentials has used a nationwide network of distributors and has generated over $110,000,000 on its sales of the 5 HOUR ENERGY® product. As a result of such continuous use and extensive sales, advertising and promotion of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress by Living Essentials, the marks and products associated with the 5 HOUR ENERGY® Trademark and Packaging Trade Dress are recognized by the public as emanating from Living Essentials.

10. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress symbolizes business goodwill of Living Essentials, and is an intangible asset of substantial commercial value.

11. On information and belief, Defendant, N2G Distributing, Inc., is a California corporation, having its principal place of business at 8020 Palm Avenue, Suite D, Highland, California 92346.

12. On information and belief, Defendant Alpha Performance Labs, is a Nevada corporation, having its principal place of business at 5448 Painted Gorge Drive, Las Vegas, Nevada 89149.

13. Less than two weeks ago, Living Essentials came to learn that the Defendants were advertising, distributing and taking orders for a supplement that included an imitation of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Defendants exhibited at a trade show in Nevada that included many of Living Essentials' distributors and customers. At the trade show, Defendants were distributing samples and taking

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

orders for a supplement that included an imitation of Living Essentials' 5 HOUR ENERGY® Packaging Trade Dress and merely modified the 5 HOUR ENERGY® Trademark to "6 Hour Energy." Defendants' advertising also indicated that their supplement is "available nationwide."

14. In addition to their activity at the Nevada trade show, Defendants offer for sale and sell their product bearing imitations of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress over the Internet and via phone orders to consumers nationwide. Defendants also have a distribution center in Michigan.

15. Defendants have no consent, license, approval or other authorization to use the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in connection with their products.

16. Based on the success of Living Essentials and a review of the products themselves, it is clear that Defendants copied Living Essentials' Trademark and terrain climber sunrise bottle in its product. Defendants also copied Living Essentials' "caution" verbatim which further shows intentional copying by the Defendants. Defendants' actions illustrate a calculated attempt to misrepresent the source of Defendants' goods so as to cause confusion, mistake or to deceive as to Defendants' connection or association with Living Essentials.

17. Defendants' advertising and sale of products of unknown quality, including imitations of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, damages the reputation of Living Essentials and has stripped Living Essentials of the ability to control which products its reputation and goodwill are being used to promote or endorse.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

III. ARGUMENT

Four factors are relevant in considering a motion for preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998); *see also, McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). In the Sixth Circuit, these considerations are not "prerequisites" to the issuance of a preliminary injunction; they are factors to be "balanced" by the court. *See, Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean (In re Delorean Motor Co.)*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Thus, a strong showing as to likelihood of success on the merits may justify entry of a preliminary injunction upon a relatively lesser showing of irreparable harm. Conversely, proof that the moving party will suffer significant irreparable injury may justify a preliminary injunction on a lesser showing of likelihood of success. *See, In re DeLorean Motor Co.*, 755 F.2d at 1229 (holding that "the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction"). In other words, a moving party may be entitled to a preliminary injunction either upon a showing of "a strong or substantial probability of ultimate success on the merits," or on a showing of "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982).

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

Living Essentials easily qualifies for preliminary injunctive relief because there is a strong likelihood that Living Essentials will succeed on the merits and the balance of hardships tips decidedly in Living Essentials' favor. Indeed, preliminary injunctive relief is routinely granted in trademark cases on the basis of the important presumption that consumer confusion creates irreparable harm to the goodwill and reputation of the trademark owner. *See, Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 939 (4th Cir. 1995) ("[W]e recognize that irreparable injury regularly follows from trademark infringement.").

IV. LIVING ESSENTIALS IS HIGHLY LIKELY TO SUCCEED ON THE MERITS

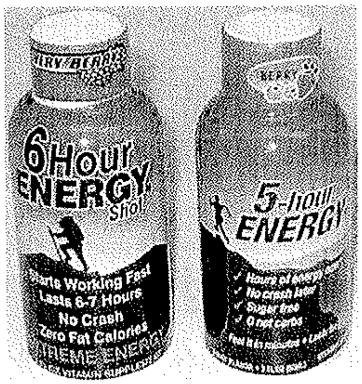
For the reasons set forth below, Living Essentials is highly likely to succeed on the merits of its claims for trademark infringement, trade dress infringement, and related counts.

The essential element of Living Essentials' claims for trademark infringement is whether Defendants have used a reproduction or colorable imitation of its Trademark and Packaging Trade Dress in commerce which is likely to cause confusion, or to cause mistake, or to deceive. *See,* 15 U.S.C. § 1114(1)(a). Living Essentials' claim for trade dress infringement, false designation of origin or sponsorship requires similar proof of likelihood of confusion "as to the affiliation, connection, or association" of Defendants with Living Essentials, or "as to the origin, sponsorship, or approval" of Defendants' products or services by Living Essentials. *See*, 15 U.S.C. § 1125(a)(1). Likelihood of confusion is the touchstone of Living Essentials' claims in this case.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

A. There Is Clearly A Likelihood Of Confusion Between Living Essentials' 5 HOUR ENERGY® Trademark And Packaging Trade Dress And Defendants' Imitation

Living Essentials' preliminary showing of likelihood of confusion is compelling. Even at this early stage, it is clear that Living Essentials will easily establish that consumers will likely be confused by Defendants' copy of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress in their product packaging, and in their sale and advertising of supplements. The similarity between Living Essentials' Trademark and Packaging Trade Dress and Defendants' products is undeniable.



DEFENDANTS **LIVING ESSENTIALS**

Defendants' supplement includes the same terrain climber at sunrise design, the same color scheme, the same presentation of the trademark, and the same size and shape of the bottle as Living Essentials' supplement. The lone alteration of 5 HOUR ENERGY® to "6 Hour Energy" is truly insubstantial. If anything, this alteration would lead consumers to falsely believe that Defendants' product is Living Essentials' stronger version of its popular 5 HOUR ENERGY® product.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

In many cases, likelihood of confusion can be established only by making an inquiry into a number of factors, such as the similarity of the parties' marks, the extent of competition, the overlap in marketing channels, characteristics of potential purchasers, and so forth.[1] An example of such case would be a dispute between involving the use of the mark "Delta" by both Delta Airlines and Delta Faucets. Such multi-factored balancing is unnecessary in other cases (such as this one) where Defendants have misappropriated Living Essentials' trademark on goods or services that are directly competitive. In this latter set of cases, where the marks are "substantially similar as to both design and use[,] . . .the court presumes that defendant's counterfeit items caused public confusion in the marketplace." *Dive 'N Surf, Inc. v. Anselowitz*, 834 F.Supp. 379, 382 (M.D. Fla. 1993) (entering summary judgment on plaintiff's infringement claim on the ground that there was no genuine issue of fact in light of the presumption of confusion); *Ferrari S.PA. Esercizio Fabriche Automobile e Corse v. Roberts*, 944 F.2d 1235, 1243 (6th Cir. 1991); *Polo Fashions v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) (holding that a presumption of public confusion arises when counterfeit symbols are substantially identical to genuine symbols and are used in the same manner as the genuine symbols are used).

The Ninth Circuit has explained the difference in the two approaches as follows:

> When the goods produced by the alleged infringer compete for sales with those of the trademark owner, infringement usually will be

---

[1] The *Frisch* factors in the Sixth Circuit for determination of a likelihood of confusion include: (1) strength of the senior mark; (2) relatedness of the goods or services; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) the intent of defendant in selecting the mark; and (8) likelihood of expansion of the product lines. *Daddy's Junky*, 109 F.3d 275. As demonstrated in the attached Declaration of Scott Henderson at paragraphs 10 and 15-18, each factor favors Living Essentials in this case.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

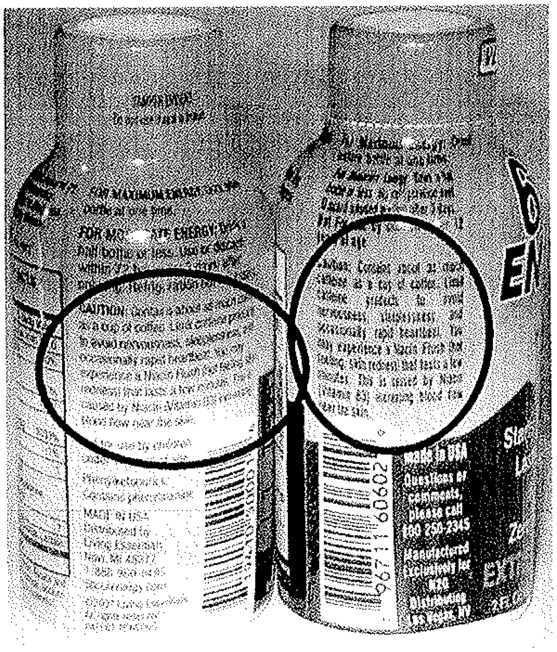
> found if the marks are sufficiently similar that confusion can be expected. When the goods are related, but not competitive, several other factors are added to the calculus.
>
> *AMF, Inc. v. Sleekcraft Boats*, 559 F.2d 341, 348 (9th Cir. 1979).

This presumption of confusion in cases involving sufficiently similar trademarks on competing goods or services has been widely adopted. *See, Interpace Corp. v. Lapp, Inc.* 721 F.2d 460, 462 (3d Cir. 1983) ("Where the trademark owner and the alleged infringer deal in competing goods or services, the court need rarely look beyond the mark itself."); *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 569 (2d Cir. 1982) (explaining that the holder of a mark "is presumptively entitled to protection from a newcomer's use of a similar mark in direct competition"); *Topps Co. v. Gerrit J. Verburg Co.*, 1996 WL 719381, *6, 41 USPQ2d 1412, 1417 (S.D. N.Y. 1996) ("Where the marks are identical and the goods are also identical and directly competitive, the decision can be made directly without a more formal and complete discussion of all of the . . . factors."); *see also, Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1172 (11th Cir. 1991) (holding that defendant's deliberate copying of plaintiff's trade dress creates a "presumption of likelihood of confusion"). By a simple comparison of the products, likelihood of confusion is undeniable. It is especially appropriate in this situation whether both Plaintiff and Defendants compete in the same supplement market and their products are directed to the same consumers.

Under Sixth Circuit law, copying creates a presumption of likelihood of confusion. *Ferrari S.PA. Esercizio Fabriche Automobili e Corse v. Roberts*, 944 F.2d 1235, 1242-43 (6th Cir. 1991)(holding that "presumption of likelihood of confusion . . . follows from intentional copying");

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

see also, Frisch's Restaurants v. Elby's Big Boy, Inc., 670 F.2d 642, 648 (6th Cir. 1982)("since the mark was adopted with the intent of deriving benefit from the reputation of [the plaintiff,] *that fact alone may be sufficient to justify the inference that there is confusing similarity.*")(emphasis in original). This case presents a textbook example of a defendant copying a widely successful trademark and trade dress to trade off of the goodwill developed by the plaintiff. The similarities extend from the terrain climber at sunrise bottle, to the color scheme and outline of the primary logo, and to the boxes in which the bottles are displayed at the point of sale. As noted above, the Defendants even copied the caution label that Living Essentials created for its supplement as illustrated below:



LIVING ESSENTIALS DEFENDANTS

Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

B. 5 HOUR ENERGY® Is A Widely Used And Powerful Trademark

As noted above, the 5 HOUR ENERGY® Trademark has been used exclusively by Living Essentials since at least September 2004. The 5 HOUR ENERGY® Trademark was designed to identify and distinguish 5 HOUR ENERGY® goods from those sold by others. Over the course of the last three and one-half years, Living Essentials has acquired distinctiveness in its 5 HOUR ENERGY® Trademark. Living Essentials' supplement is quite popular in the marketplace, and has generated revenue of over $110 million.

Living Essentials has also invested substantially — on the order of $30 million — in nationwide advertising and marketing to promote the trademark. Indeed, the 5 HOUR ENERGY® supplement is one of the most successful, if not the most successful, supplement in the market. Indeed, sales of Living Essentials' 5 HOUR ENERGY® supplement continue to grow quarter over quarter. In the first two months of 2008 alone, Living Essentials has sold over $22 million worth of this supplement. This success is based on the development of a quality reputation and product associated with the 5 HOUR ENERGY® Trademark.

This extensive use and marketing has led to the acquisition of acquired distinctiveness, also called secondary meaning. The Sixth Circuit typically considers seven factors for determining secondary meaning, including:

(a) direct consumer testimony;
(b) consumer surveys;
(c) exclusivity, length, and manner of use;
(d) amount and manner of advertising;
(e) amount of sales and number of customers;

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

(f) established place in the market; and
(g) proof of intentional copying

> *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 640 (6th Cir. 2002).

Even at this early stage, secondary meaning is clearly established by the extensive and exclusive use of the 5 HOUR ENERGY® Trademark on Living Essentials' one-dose vitamin supplement.[2] The sales, advertising and exclusive place in the market as a leading supplement cannot be disputed. While there are no surveys or consumer testimony on this record, the final factor of intentional copying is particularly significant in this case.

In the Sixth Circuit, secondary meaning can be presumed when it is apparent that the defendant intentionally copied the plaintiff's trade dress as is the case here.

> The evidence of intentional copying shows the strong secondary meaning of the Ferrari designs because "there is no logical reason for the precise copying save an attempt to realize upon a secondary meaning that is in existence." *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc., 283 F.2d 551, 558 (9th Cir. 1960).*
>
> *Ferrari S.PA. Esercizio Fabriche Automobili e Corse v. Roberts*, 944 F.2d 1235, 1239 (6th Cir. 1991); *see also DAP Products v. Color Tile Manufacturing*, 821 F.Supp. 488, 492 (S.D. Ohio 1993)(Secondary meaning can be presumed where a court can infer that the defendant intentionally copied plaintiff's color scheme.)

[2] Secondary meaning is statutorily presumed based on five years of substantially exclusive use, without any showing of sales or advertisements. 15 U.S.C. § 1052(f). Here, we have three and one-half years of exclusive use coupled with hundreds of millions in sales and advertisements.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

C. **The Sunrise Climber Trade Dress Is Inherently Distinctive And Non-Functional**

Packaging Trade Dress is protectable when it has acquired secondary meaning **or** when it is inherently distinctive. *Wal-Mart, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212-13 (2000)("Consumers are therefore predisposed to regard those symbols [such as 'brightly decorated plastic bottles'] as indication of the producer, which is why such symbols 'almost *automatically* tell a customer that they refer to a brand,' *514 U.S. at 162-163*, and 'immediately . . . signal a brand or a product source,'" *514 U.S. at 163*. Citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).) Here, as recognized in *Wal-Mart*, the brightly colored plastic bottle design that includes the terrain climber at sunrise is protectable trade dress[3] because it is inherently distinctive. In any event, as set forth above, the 5 HOUR ENERGY® Packaging Trade Dress has certainly acquired secondary meaning through its extensive use in the marketplace.

For a trade dress claim, Living Essentials must also show that the terrain climber at sunrise is not functional. 15 U.S.C. § 1125(a)(3). An asserted trade dress is functional if it is essential to the use or purpose of the product. Here, the design on the bottle has absolutely nothing to do with the use of purpose of the supplement and does not affect the cost or quality of the supplement. The 5 HOUR ENERGY® Packaging Trade Dress is not functional. *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 642 (6th Cir. 2002). There

---

[3] As noted above, the 5 HOUR ENERGY® Packaging Trade Dress includes the terrain climber at sunrise design, the color scheme, the presentation of the 5 HOUR ENERGY® Trademark, and the shape of the bottle which includes a short neck and a main container with broad shoulders – all aspects that have been copied by the Defendants.

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

are countless other bottle designs that could have been employed by Defendants, but they decided to trade off of the goodwill developed by Living Essentials.

V. HARM TO LIVING ESSENTIALS' TRADEMARK IS PRESUMPTIVELY IRREPARABLE

Courts have long adopted a presumption that irreparable injury "follows as a matter of course" from the infringement of valuable trademark rights. *Opticians Ass'n of America v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987); *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1056 (6th Cir. 1999)("[I]rreparable injury 'ordinarily follows when a likelihood of confusion or possible risk to reputation appears' from infringement or unfair competition. . . . Thus, a court need only find that a defendant is liable for infringement or unfair competition for it to award injunctive relief.")

The presumption of irreparable injury is appropriate here. If Defendants are permitted to continue misappropriating the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, Living Essentials will suffer irreparable damage to its goodwill and reputation by the loss of control over its trademarks. As another court explained:

> In the context of trademark litigation, "grounds for irreparable harm include loss of control of reputation, loss of trade, and loss of goodwill," regardless of whether the infringer is putting the mark to a good or favorable use. *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 (3d Cir. 1992). Liquid Glass's unauthorized use of the Porsche marks inhibits Porsche's ability to control which products its reputation and good will are being used to promote or endorse. This lack of control and potential damage to Porsche's

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

> reputation constitutes irreparable injury because monetary damages cannot adequately compensate for harm to good will or reputation.
>
> *Liquid Glass Enterprises v. Dr. Ing. h.c.F. Porsche AG*, 8 F.Supp.2d 398, 406 (D. N.J. 1998).

In other words, Plaintiff's "lack of ability to control the nature and quality of services provided under an infringing . . . mark, even if defendant matches the high quality of plaintiff's services, constitutes irreparable injury." *Fotomat Corp. v. Photo Drive-Thru, Inc.*, 425 F.Supp. 693, 711 (D. N.J. 1977).

Because of the inherent difficulty of placing a value on the damage to such intangibles as the goodwill or reputation of a business, courts routinely grant injunctions in trademark actions. *See, e.g.*, *Aveda Corp. v. Evita Marketing, Inc.*, 706 F.Supp. 1419, 1431 (D. Minn. 1989) ("Any hardship caused by the preliminary injunction may justly fall on the parties which consciously decided to dress their goods for the market in a manner 'so near to [a] successful rival that the public may fail to distinguish between them.'"). Thus, if Defendants are permitted to continue misappropriating the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, Living Essentials will suffer irreparable damage to its goodwill and reputation by the loss of control over its trademark.

In this case, there is even further irreparable damage. Defendants' product of unknown quality and Defendants' product does not include industry cautions for products that include phenylalanine.[4] Customers that have a negative reaction to Defendants' products may

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

---

[4] Defendants' product includes L-phenylalanine on the ingredients list, but not does include a Phenylketonurics caution. *See* illustration on page 12, *infra*.

mistakenly believe that the Defendants' product is associated or affiliated with Living Essentials. Living Essentials can no longer control its own reputation in the marketplace, and Living Essentials' reputation is at serious risk.

VI. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN LIVING ESSENTIALS' FAVOR

Under these circumstances, the balance of hardships tips decidedly in Living Essentials' favor. While the injury to Living Essentials is immeasurable and irreparable, the only "harm" to Defendants will be an injunction against their attempts to misappropriate the 5 HOUR ENERGY® Trademark and Packaging Trade Dress by using the goodwill associated with Living Essentials to draw consumers to Defendants' business and websites, and to otherwise confuse consumers. No legitimate purpose is served by this misappropriation of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, and no cognizable injury will result. *See, Minnesota Mining and Manufacturing Company v. Taylor*, 21 F.Supp.2d 1003, 1005 (D. Minn. 1998) (finding that a preliminary injunction against defendant's misappropriation of the "POSTIT.COM" domain name would not cause "any harm" to the defendant).

Living Essentials' injury is monumental and incalculable by comparison. Living Essentials has invested substantial sums in the development and marketing of its valuable trademarks and trade dress, and Defendants' violation of Living Essentials' trademark rights poses an immeasurable threat to Living Essentials' goodwill as explained above.

To the extent there is any risk of harm to Defendants, such harm is easily calculable and cannot be deemed irreparable. At most, Defendants' losses (if any) from the injunction sought

BK
Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA
Tel (248) 358-4400
Fax (248) 358-3351

by Living Essentials would be a loss of revenues.[5] Where any "potential losses to the defendant are easily calculable," the balance of hardships tips strongly in the plaintiff's favor. *See, Heinz v. Frank Lloyd Wright Foundation*, 1986 WL 5996, 229 USPQ 201, 210 (W.D. Wis. 1986) (plaintiff's loss of goodwill not quantifiable, and therefore outweighs defendant's loss of sales which can be calculated).

VII. THE PUBLIC INTEREST WILL BE ADVANCED BY A PRELIMINARY INJUNCTION

Finally, the public interest also favors entry of a preliminary injunction in this case because "the public is interested in fair competitive practices and clearly opposed to being deceived in the marketplace." *Estate of Presley v. Russen*, 513 F.Supp. 1339, 1382 (D. N.J. 1981); *see also, Green Products*, 992 F.Supp. at 1081 (holding that a preliminary injunction against a defendant's misappropriation of plaintiff's trademark in a domain name advances the public interest).

---

[5] Any loss of revenue may be "discounted by the fact that the defendant brought that injury upon itself" by its intentional copying. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3d Cir. 2002)(preliminary injunction against false advertising was granted and affirmed.)

Brooks Kushman P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075-1238
USA

Tel (248) 358-4400
Fax (248) 358-3351

VIII. CONCLUSION

For the foregoing reasons, the Court should grant a temporary restraining order and a preliminary injunction enjoining Defendants from imitating, copying, or making unauthorized use of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in their advertisement and sale of supplements and other products.

Respectfully submitted,

BROOKS KUSHMAN P.C.

By: /s/ Marc Lorelli
MARK A. CANTOR (P32661)
MARC LORELLI (P63156)
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(248) 358-4400
E-mail: mantor@brookskushman.com
mlorelli@brookskushman.com

Attorneys for Plaintiff

Dated: March 13, 2008

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

Reg. No. 3,003,077

United States Patent and Trademark Office Registered Sep. 27, 2005

TRADEMARK
SUPPLEMENTAL REGISTER

5 HOUR ENERGY

INNOVATION VENTURES LLC (MICHIGAN LTD LIAB CO), DBA LIVING ESSENTIALS,
3141 OLD FARM LANE
WALLED LAKE, MI 48390

FOR: HOMEOPATHIC SUPPLEMENTS, PHARMACEUTICAL PREPARATIONS, NUTRITIONAL SUPPLEMENTS AND DIETARY SUPPLEMENTS THAT RELIEVE OR PREVENT FATIGUE, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 6-0-2005; IN COMMERCE 6-0-2005.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 78-434,496, FILED P.R. 6-14-2004; AM. S.R. 7-19-2005.

MARK T. MULLEN, EXAMINING ATTORNEY